IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3166

SONDRA SHEREN,

Plaintiff-Appellant,

DAYTON HUDSON CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CV 2171—**James B. Zagel** *Judge.*

ARGUED February 12, 1999—DECIDED February 18, 1999

Before POSNER, Chief Judge, FLAUM and EASTERBROOK, Circuit Judges.

Order

Sondra Sheren suffers from macular degeneration, has cataracts in both eyes (and is legally blind in one), and cannot read small print or distinguish fine differences in color or pattern. These limitations (coupled with vertigo associated with her loss of vision) posed obstacles to her work as a sales associate in the furniture department of a large store. Sheren told her supervisor that she could not go on without assistance; her physician, more emphatic, opined that she was "[u]nable to continue in current position", period.

Sheren's employer placed her on disability leave and, when disability benefits ran out, ended her employment. In this suit under the Americans with Disabilities Act, Sheren insists that the department store could have found some accommodation that would have enabled her to continue working. But, as the district judge observed, the principal

suggested accommodation—a magnifier so large that it would have been immobile—would not have helped Sheren to advise customers on color choices, and the need to walk back to the magnifier throughout the dat would have unduly hajpered sales, given that the furniture department covers an entire city block (and that Sheren often bumped into things in the aisles). Plaintiff's challenges to the grant of summary judgment do not persuade us that the district court erred, and we affirm substantially for the reasons given by the district judge. 1998 U.S. Dist. LEXIS 12061 (N.D. Ill.).

AFFIRMED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3166

SONDRA SHEREN,

Plaintiff-Appellant,

DAYTON HUDSON CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CV 2171—**James B. Zagel** *Judge.*

[February 18, 1999]

JUDGMENT — WITH ORAL ARGUMENT

Honorable Richard A. Posner, Chief Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SONDRA SHEREN,

Plaintiff,

No. 96 CV 2171 *v.*

DAYTON HUDSON CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

In June 1991, defendant Dayton Hudson Corporation hired plaintiff Sondra B. Sheren to work in the furniture department at the Marshall Field's store on State Street in Chicago, Illinois.

In the summer of 1995, Sheren informed her supervisor that her eyesight had deteriorated to such an extent that it was interfering with her ability to perform her job. After unsucessfully exploring ways to accommodate her disability with a Marshall Field's assistant human resources manager, Sheren went on short term disability leave in September 1995. Apparently, Sheren has not worked for Dayton Hudson since then.

On April 17, 1996, Sheren filed a complaint against Dayton Hudson alleging discrimination under the Americans With Disabilities Act ("ADA"), 42 U.S.C.§12101, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.§621 et seq. Subsequently, Sheren waived her ADEA claim, and now, Dayton Hudson moves for summary judgment on the ADA claim. Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). The non-

party may not rest on the pleadings if it bears the burden of proof on an issue, that party must instead show that there is a gunuine issue of material fact. *Vanasco v. Naitonal Louis University,* 137 F.3d 962, 965 (7th Cir. 1998).

Discussion

The ADA probibits discrimination against a qualified individual with a disability based upon such disability. 42 U.S.C.§12112(a). Defendant argues that Sheren is not a "qualified individual" because she cannot show she was qualified to perform her job as a furniture sales associate. A "qualified individual" is one "who, with or without reasonable accomodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.§12111(8). Sheren contends that she was a qualified individual because she possessed the "requisite skill, experience, education and other job-related requirements", 29 C.F.R.§1630.2(m), of her job as proven by her success a productive salesperson. Defendant does not dispute that Sheren possessed the skills and experience necessay to perform as a furniture sales associate. But to prove that she was a qualified individual Sheren also needs to show that she could "perform the essential functions of [her] position, deteriorated.[1] The parties agree that the functions of a furniture sales associate at Marshall Field's included assisting customers with room plans and color schemes, showing furniture, presenting fabric samples and corrdinating accessories, such as lamps and rugs, with furniture. Sheren alleges that even after she requested an accommodation for her disability

---

1. According to the federal regulations interpreting the ADA, a "qualified individual with a disability" is an individual with "[1] the requisite skill, experience, education and other job-related requirements...*and* [2] who . . . can perform the essential functions of such position." (Emphasis added).

she continued to work as a sales associate without experiencing any increased difficulties at work. I find that it is apparent from the record that even if Sheren did not experience increased difficulties at work after requesting an accommodation, by the time she requested one her eyesight had already deteriorated to the point that she could not effectively perform her essential duties. On August 8, 1995, Sheren told Marshall Field's Assistant Human Resources Manager Susan Varga that she was having problems reading numbers in catalogs and on merchandise tags and that she might not be able to continue in her job. This inability to read small numbers carried over to other parts of her job. In a disability report filed with the Department of Health and Human Services, Sheren explained that she could not "distinguish the fine differences in appearance of furniture or fabrics—I cannot read catalogues, brochures, computer screens which are essential for my job." Sheren's disability was also confirmed by letters from her personal physician, Dr. Bowser, which Sheren transmitted to Varga on August 22, 1995 and on August 24, 1995. In these letters Dr. Bowser opined, inter alia, that Sheren had a "loss of vision," "significant problems with color differentiation, depth perception, and reading[,]" and "will need to fine [a] new position taking in consideration her visual disabilities." This evidence clearly shows that without an accommodation Sheren could not effectively assist customers in selecting furniture, fabrics, and accessories as required of a furniture sales associate.

Still, Sheren contends that her supervisor, Jack Sullivan, testified he never observed her having trouble assisting customers or received complaints about her performance. I find that given Sheren's own testimony and her physician's contentions that she had trouble performing her job and assisting customers, these allegations regarding Sullivan are immaterial.

Could Sheren have performed her job with a reasonable accomodation? The ADA provides that "discrimination"

includes an employer's failure to "mak[e] reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . ." 42 U.S.C.§12112(b)(5)(A). To satisfy the accommodation requirement "the employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995). Sheren contends that defendant failed to consider the accomodations that she suggested and, instead, ordered her to take a disability leave. Defendant contends that the five accommodations that Sheren proposed — i.e., create a new position; provide her with an assistant; allow her to ask her customers to perfomr some of her duties; place a magnification machine at her desk; or keep the store aisles clear of blockage — were not reasonable. Because Sheren only disputes the reasonableness of the latter two proposed accommodations, I address them now and find that Sheren waived any arguments that the other accommodations would have been reasonable. *See Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997). Defendant contends that placing a magnification machine at Sheren's desk would disrupt operations and negatively affect customer service because Sheren's work area included two floors of the store — each of which comprised a city block — where furniture is located and parts of other floors where accessories are located. I agree with defendant that given this large work area it would be have been unreasonably inconvienient for Sheren to return to her desk and consult a magnifier installed there every time she needed to see merchandise in which customers showed interest. Second, defendant argues that keeping the store aisles clear would not have been a reasonable accomodation because it would not have enabled Sheren to perform her customer service duties of discerning characteristics of fabrics, furniture, and accessories and it would have been impractical given that employees and customers

are constantly moving furniture around on the floor to create new displays and assess furniture arrangements. If defendant were to keep the aisles clear it would have likely prevented Sheren from accidentally bumping into furniture and facilitated her ability to move around the floor, but this is not an accomodation that would have addressed her ability to see, distinguish, and describe the furniture and upholsteries that she had the duty, as a furniture sales associate, to sell to customers. Sheren does not dispute this. She merely claims that defendant lacks evidentiary support for its arguments. But Sheren, not defendant, bears the burden of proof on this issue, see *Sieberns*, 125 F.3d at 1022-23, and she provides none. She also fails to present any evidence that defendant did not consider her proposed accommodations. I accept defendant's explanation for why it rejected Sheren's proposed accommodations as unreasonable or ineffective.

Additionally, the record shows that defendant engaged in a dialogue with Sheren to try to reasonably accommodate her. *See Bultemeyer v. Forte Wayne Community Schools*, 100 F.3d 1281, 1285-86 (7th Cir. 1997) ("The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.") (citing 29 C.F.R. pt. 1630, app; *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1135 (7th Cir. 1996) (internal quotations omitted)). Specifically, defendant's assistant human resources manager Susan Varga met with Sheren several times and discussed other types of jobs that she might take instead of the furniture sales associate position. Varga researched the availability of other open positions, but she did not find one that fit Sheren's own desired criteria and health restrictions. Varga also considered creating a new position for Sheren handling telephone orders for furniture, but she rejected the idea after Sullivan, Sheren's supervisor told her that this would unfairly affect the rest of the sales associates who ordinarily share these duties.

I find that the defendant engaged in a dialogue with Sheren and considered making changes to enable her to work but was unable to discover a reasonable accommodation that would fulfill this purpose. Further, because Sheren cannot show she could perform her job with or without a reasonable accommodation, she does not fall within the class of persons protected by the ADA.

Conclusion

Dayton Hudson's Motion for Summary Judgment is granted.

ENTER:

/s/James B. Zagel
United States District Judge